

# Mining 2019

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# Mining 2019

**Contributing editors****Michael J Bourassa and Alison Lacy****Fasken**

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Mining*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Michael J Bourassa and Alison Lacy of Fasken, for their continued assistance with this volume.



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# Thailand

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## MINING INDUSTRY

### Standing

- 1 | What is the nature and importance of the mining industry in your country?

Thailand was formerly a major tin producer, but now produces mainly industrial rock, including limestone, gypsum, rock salt, dolomite and basalt. The mining industry has been less active since the enactment of the new Minerals Act in 2017, policy to suspend gold mining, and issues regarding restriction on the use of agricultural land. See also the website of the Mining Industry Council of Thailand at [www.miningthai.org](http://www.miningthai.org) and the website of the Department of Primary Industries and Mines (DPIM) at [www.dpim.go.th](http://www.dpim.go.th) for current information and statistics.

- 2 | What are the target minerals?

In Thailand, approximately 40 minerals are produced. Based on the information provided on the DPIM website, the most-produced target minerals in 2017 were industrial minerals and industrial rocks. During the past year, mining production for almost all minerals reduced, with few exceptions.

### Regions

- 3 | Which regions are most active?

There is exploration and mining activity in all regions. For example, limestone is produced in central, western, southern and northern regions and zinc is produced in western regions. The regions covering the largest mining area is central region.

## LEGAL AND REGULATORY STRUCTURE

### Basis of legal system

- 4 | Is the legal system civil or common law-based?

Thailand's legal system is civil law-based.

### Regulation

- 5 | How is the mining industry regulated?

The mining industry is regulated by the Ministry of Industry (MOI) and the DPIM at the central level, and by the local mineral industry officials (LMIOs) at the provincial level. However, a number of government agencies have regulatory powers over various elements of mining projects.

See question 6.

- 6 | What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Until 28 August 2017, the principal laws regulating the mining industry were the Minerals Act (1967) and the Mineral Royalty Rates Act (1966). The Minerals Act (1967), last amended in 2002 by the Minerals Act No. 5, governed onshore and offshore exploration, mining, processing, mineral production, mineral trading, possession of minerals, ore dressing, transport and export of minerals other than petroleum. The Mineral Royalty Rates Act (1966) prescribed the rates of royalties to be assessed for different kinds of minerals.

The new Minerals Act, BE 2560 (2017), came into effect on 29 August 2017, repealing the following 10 laws:

- Minerals Act, BE 2510 (1967);
- Minerals Act (No 2), BE 2516 (1973);
- Minerals Act (No 3), BE 2522 (1979);
- Emergency Decree amending the Minerals Act, BE 2510 (1967), BE 2526 (1983);
- Emergency Decree amending the Minerals Act, BE 2510 (1967) (No 2), BE 2528 (1985);
- Minerals Act (No 4), BE 2534 (1991);
- Minerals Act (No 5), BE 2545 (2002);
- Mineral Royalty Rates Act, BE 2509 (1966);
- Mineral Royalty Rates Act (No 2), BE 2520 (1977); and
- Mineral Royalty Rates Act (No 3), BE 2522 (1979).

There are many existing mining rights to which the old Mineral Act still applies, unless expressly superseded.

All ministerial regulations, notifications, rules, or orders issued under the Minerals Act (1967) and the Mineral Royalty Rates Act (1966), which were effective before the date the new Minerals Act came into force, continued to be effective to the extent that they are not contrary to nor inconsistent with the new Minerals Act. The new Minerals Act specifies that related regulations are to be issued within two years from the effective date, that is, 28 August 2019. As at 31 March 2019, there were six ministerial regulations, 33 notifications, one regulation, two orders issued by the MOI and 53 notifications, two regulations and four orders issued by the DPIM under the new Mineral Act, which have been posted on the DPIM's website in the Thai language.

The new Minerals Act contains a transitory provision that any application submitted before the effective date of the Act will also be deemed an application under the new Minerals Act, and will be considered under the rules as specified in the new Minerals Act. Furthermore, any prospecting licence, mining lease, or licence issued under the Minerals Act (1967) before the effective date of the new Minerals Act will be deemed issued under the new Minerals Act and will be effective until it expires or is revoked. Any obligation under any agreement made with the Thai

government by the MOI and DPIM before the effective date of the new Minerals Act will remain effective until the expiration of that obligation.

The new Minerals Act and ministerial regulations (MRs), notifications, etc issued thereunder place significant new obligations on mining businesses. The new Act aims to provide stricter environmental controls, decentralise administrative power, encourage the use of newer mining technologies and provide more protection for those living in mining areas.

The Minister of Industry is charged with administration of the Minerals Act, and has issued MRs, notifications and other orders. The National Mineral Administrative Policy Board (NMAPB or the Board) was established. The Director-General of the Department of Mineral Resources (DMR) and Director-General of the DPIM will be co-secretary of the Board and the DMR will function as a secretarial office for the Board.

There are three committees responsible for mining issues:

- the NMAPB is mainly responsible for proposing national strategy, policy and the master plan on mineral management to the Council of Ministers as well as monitoring and assessing the operation of work to ensure the implementation of such strategy, policy and plan;
- the Mineral Committee is charged with advising ministers on bidding and issuance of ministerial regulations and notifications, approval of licences, renewals, transfers, revocation of conditions of mining in categories 2 and 3, considering complaints and providing assessments of the impact on people's health and the environment; and
- the Provincial Minerals Committee is responsible for a wide range of issues re MLs Category 1.

On 31 July 2018, the Council of Ministers approved a 20-year mineral management strategy (2017–36) and a five-year mineral management plan for 2017–21. The strategy and master plan aim to integrate Thailand's management of mineral resources while ensuring that the mining industry will be environmentally friendly, with an elevated focus on the quality of life of people affected by the mining industry. In the approved strategy, the four points of emphasis are:

- the classification of a mineral zone;
- the formulation of mineral policy;
- the development of a regulatory mechanism; and
- the promotion of general public participation.

The principal environmental law is the National Environment Protection and Promotion Act (1992) as amended by its amendment in 2018 (the Environmental Act) and is administered by the Office of Natural Resources and Environmental Policy and Planning (ONEP) at the Ministry of Natural Resources and Environment (MNRE) (see questions 35 and 36).

## 7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

There is no legal classification system for reporting mineral resources and mineral reserves. In practice, the DPIM will classify the ore reserves based on reserves in mining lease areas and in areas of mineral potential. Information regarding Thailand's ore reserves is publicly available, in Thai, at [www.dpim.go.th/dpimdoc/ores](http://www.dpim.go.th/dpimdoc/ores).

## MINING RIGHTS AND TITLE

### State control over mining rights

- 8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Mining rights are granted by the Minister of Industry under the Minerals Act. Section 52 of the new Minerals Act states that no person shall mine in any area, regardless of any person's right over the surface area to be mined unless a mining lease has been obtained. In Thailand, minerals belong to the state. Mining rights do not grant title to minerals in the ground. The mining license holder can sell minerals specified in the mining lease only. Other minerals acquired incidentally may be sold by the leaseholder only after receiving a licence from the Director-General of the DPIM. Under section 53 of the new Minerals Act, the Minister will issue a notification to classify mining into three categories:

- category 1 mining – mining in an area of no more than 100 rai (one rai equals 1,600m<sup>2</sup>), where the mining lease shall be issued by the LMIO on approval of the Provincial Mineral Committee in the province where the mining is operated;
- category 2 mining – mining in the area of no more than 625 rai (equal to 1km<sup>2</sup>), where the mining lease shall be issued by the Director-General with approval of the Mineral Committee; and
- category 3 mining – mining other than category 1 or category 2 mining, offshore mining and underground mining, where the mining lease shall be issued by the Director-General with approval of the Mineral Committee.

There is no limit on the number of mining leases (MLs) that may be acquired by one person. Therefore, in practice, it is possible to mine over a larger area than the prescribed area limits. The application process for an ML for the landowner of the land to be mined is the same as for those who do not own the property.

The maximum duration of mining rights is 30 years (compared with 25 years under the old Minerals Act).

### Prospecting

The Act provides for the issuance of:

- prospecting licence, valid for one year;
- general exclusive prospecting licence, valid for not more than two years, with an area of not more than 2,500 rai; and
- special prospecting licence, valid for not more than five years, with an area of not more than 10,000 rai for onshore, and not more than 500,000 rai for an offshore area.

### Mineral dressing and metallurgical processing

Licences may be issued, valid for no more than five years.

### Cancellation, amendment and revocation of licences

There are provisions for dismissing applications, amendment of licences, penalties and revocation of licences.

### Mineral royalties, fees and special contributions

Royalty rates are established under ministerial regulations. Rates are capped at 30 per cent (see question 19).

The Act includes a schedule of fees. The Minister has authority to reduce fees.

The Act includes provisions for civil liabilities, seizure and attachment, penalties and transitional provisions. Holders of mineral rights granted under the old Minerals Act should study the transitional provisions carefully, because in many cases they will be subject to rules prescribed under the new Minerals Act.

### Publicly available information and data

- 9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Mining laws and regulations, information regarding the number of mines by kinds of minerals, number of licence holders and applicants for licences and mineral assessment statistics are publicly available in Thai via the DPIM website ([www.dpim.go.th](http://www.dpim.go.th)). The DPIM prepares mineral assessments by collecting mineral assessment reports submitted by licence holders. Database of DPIM is available online.

### Acquisition of rights by private parties

- 10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

See question 8.

Major mining rights include exploration rights and mining leases. Mining rights are granted with certain conditions and validity as prescribed by the Minerals Act. The Minister of Industry has the power to revoke the rights if the holder fails to comply with the conditions attached to the granted right. The approval of mining rights is not specified in the law itself and can vary. To apply for any mining rights, the applicant must submit an application together with supporting documents and information required with the LMIO and pay the fees at the specified rate.

### Exploration rights

For exploration activities, a prospecting licence must be acquired. In the case of overlapping applications for the same area, the first application to be submitted will be processed first. There are three kinds of prospecting licences that investors may apply for, namely, the general prospecting licence (GPL), the exclusive prospecting licence (EPL) and the special prospecting licence (SPL).

A GPL is a non-exclusive, non-renewable and non-transferable licence and is valid for one year. A GPL grants rights for mineral prospecting and exploration within a designated area of an administrative district or a province. The LMIO has the authority to issue a GPL. Mineral prospecting under this licence can be conducted only by geological, geochemical or geophysical surveys. Prospecting methods that directly collect mineral samplings, such as pitting, trenching and drilling are not allowed.

An EPL grants sole mineral prospecting and exploration rights within a designated area, and is valid for no more than two years. An EPL is issued by the Director-General and is non-transferable. An EPL is limited to an area not exceeding 2,500 rai. There are a number of conditions the holder of an EPL has to comply with, including:

- the filing of a report 180 days after the receipt of the EPL describing the first operations and works undertaken within 30 days from the end of that 180-day period; and

- filing a final exploration report 30 days before the expiry date of the EPL.

An SPL is issued by the Director-General with approval of the Mineral Committee, and is valid for a duration of five years and is non-renewable. The exploration area that may be granted under an SPL may not exceed 10,000 rai, except applications to explore offshore may be made for 500,000 rai each. An application for an SPL must include a work plan and an estimate of expenses for each year for the whole project, as well as an offer of 'special benefits' to the government. The special benefits will further bind the holder of the SPL upon receiving a mining lease for mining in the area for which the SPL has been granted. A progress report must be submitted to the DPIM every 180-day period commencing from receipt of a licence. An SPL is suitable for large projects entailing high-value minerals or substantial investment capital, and also in the event an applicant requires more time or a larger area for exploration. The prospector may relinquish areas he or she no longer wishes to prospect.

The SPL holder will generally get preferential rights to acquire a mining licence for the area the SPL covers. If there are multiple applicants, owners or possessors of such land obtain priority above all other applicants under the Land Code.

### Mining rights

Upon discovery of a commercial mineral deposit, a prospector must apply for an ML in order to conduct mining activities. Generally, applications will be treated on a first come, first served basis.

The ML are divided into three categories. There is no limit on the number of MLs that may be applied for by one person. An ML is valid for a maximum of 30 years and may not be transferred without the approval of mining right issuers.

An applicant for an ML must provide a map showing the area to be mined, reliable evidence of the discovery or existence of the mineral to be mined, evidence showing acquisition of surface land rights, plans on the rehabilitation, proposals of special benefits to the state and other documents or evidences as prescribed in the ministerial regulation.

Special rules apply to underground mining, defined in section 4 of the new Minerals Act. Applications for underground mining (but not surface mining) now require that the applicant provide a restoration plan and security for restoration of the mining area, and remedies for persons affected by the mining (sections 81(8) and 81(9)). As regards ML holders for underground mining who do not provide the requisite security or insurance for any damages determined to have been caused by the mining activities within 15 days of notice of the same, the ML issuer has the power to issue an order to revoke the ML (section 90).

### Special rules for offshore mining

In August 1978, the cabinet passed two resolutions regarding offshore mining of minerals at depths not exceeding 200 feet. The resolutions are summarised as follows.

### Known deposits

After the expiry of the maximum mining lease period of 25 years, a foreign mining leaseholder may apply for a new ML to work an old deposit, provided that it realigns its equity interests so that Thai nationals hold at least 60 per cent of the total equity interest in the venture.

### Unknown deposits

A company with foreign shareholders may apply for an ML to exploit a new deposit offshore, provided that Thai nationals hold at least 51 per cent of the equity interest initially, to be increased to 60 per cent within two years.

The above resolutions constitute administrative guidelines to be followed by the DPIM in its consideration of whether or not to grant or renew an offshore ML.

### Other approvals required

#### Purchase of minerals

Any person who wishes to purchase controlled minerals must obtain a licence from the DPIM. A purchasing licence is valid for not more than five years from the issuance date. The holder of a purchasing licence may not purchase minerals at any place other than the place specified in the purchasing licence. Purchasing minerals outside the specified place of purchase requires an external purchasing licence, which will be valid for the same period as the purchasing licence. A holder of a purchasing licence must keep accounts of minerals bought and sold and minerals still on hand.

#### Transportation and storage of minerals

The transportation of minerals requires a mineral royalty be paid or guaranteed. For most minerals, an ore transport licence must accompany the transporting vehicle to the destination stated in the licence. Any person who wishes to store minerals outside a mining area or outside a designated place of purchase must also obtain a storage licence.

#### Ore dressing

Except for an ML holder undertaking mineral dressing within the mining lease area, no one can undertake ore dressing operations without a licence. The licence is valid for a maximum of five years.

#### Metallurgical processing

Except for an ML holder undertaking metallurgical processing within the mining lease area, no one can undertake metallurgical processing operations without a licence. A metallurgical licence is valid for a maximum of five years.

### Renewal and transfer of mineral licences

11 | What is the regime for the renewal and transfer of mineral licences?

#### Exploration licences

All types of prospecting licences are non-transferable and non-renewable.

#### Mining licences

An ML is transferable in accordance with rules, procedures and conditions prescribed in a notification by the Minister. The application and required supporting documents requested for approval of transfer or renewal shall be submitted with the LMIQ. Where the ML provides for a term of less than 30 years and the ML holder applies for renewal in accordance with the rules and regulations at least 180 days before ML expiry, the Minister of Industry may extend the terms of such an ML provided that the aggregate term does not exceed 30 years.

#### Duration of mining rights

12 | What is the typical duration of mining rights?

See question 8.

#### Prospecting

- GPL – maximum of one year;
- EPL – maximum of two years; and
- SPL – maximum of five years.

### Mining

- category 1 mining – maximum of 30 years;
- category 2 mining – maximum of 30 years; and
- category 3 mining – maximum of 30 years.

Grounds for revocation are prescribed in a number of sections of the new Minerals Act.

### Acquisition by domestic parties versus acquisition by foreign parties

13 | Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Government policy is not to grant mineral rights to foreign nationals (including companies in which ownership by foreign nationals exceeds 49 per cent). However, it is possible to grant mineral rights to a foreign company under a special agreement. Majority foreign-owned companies wishing to operate a mining business must obtain a licence granted by the Minister of Commerce with the approval of the Thai cabinet as required under the Foreign Business Operation Act. The majority foreign-owned company can operate a mining business only if at least 40 per cent, or (with approval of the cabinet) 25 per cent of the capital is held by Thai nationals or Thai entities and at least two-fifths of the directors are Thai nationals.

The Land Code (1954) prescribes a ceiling on foreign ownership of 49 per cent or not more than half of their shareholders; there is no restriction on foreign nationals leasing land. In the case the land to be applied for mining business is National Reserved Forest, the company must have more than two-thirds of the shareholders or partners being Thai nationals holding more than half of the total number of shares. In the case the land is forest land, the company must have more than two-thirds of the shareholders or partners being Thai nationals holding more than half of the total number of shares and its authorised person (authorised director) must be Thai.

In the case of a change in shareholding structure or change of control in the licence holder or its parent company, the Minerals Act does not require the licence holder to submit any notice of such a change. However, in the event of a structural change that results in shares becoming majority-foreign owned, a foreign business licence would be required under the Foreign Business Operation Act (1999), the company would be prohibited from owning land under the Land Code and from obtaining licensing to use a forested area.

On 30 January 2018, the MOI issued a new notification restricting foreign ownership. The purpose of the notification was to prohibit foreigners from operating mining businesses through the use of 'cover-up' schemes in order to conceal ultimate foreign ownership. The notification is silent as to how its provisions will be applied to existing licensees. Regardless of an unclear application, a structure which is as inconsistent with the limitations that it prescribes could lead to disapproval or revocation of a mining application or cancellation of mining rights.

### Protection of mining rights

14 | How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

There is an independent court system in Thailand, including an administrative court to hear cases involving government agencies (such as the DPIM). Current government policy is that contracts with a government agency cannot include arbitration provisions, with exceptions approved by the cabinet. Under Thai law, judgments entered by a foreign court are



not enforceable in Thailand. The foreign judgments can be introduced as evidence in an enforcement proceeding in a Thai court. A Thai court is free to examine new issues arising in the case. Foreign arbitration awards are enforceable under Thai law.

One factor that is often cited as an impediment to the mining industry's development is the lack of 'security of tenure'. The existing legal system does not expressly guarantee that the holder of an exploration licence will be granted an ML if it makes a commercial discovery. The government bureaucracy and the limited scope of the mining laws are not the sole causes of the inability to assure the right to mine prospected land; conflicts and restrictions from other authorities as well as subsequent land use conflicts complicate the issuance of rights.

One characteristic of the Thai bureaucracy that causes it to stand out is the divided nature of Thai administration. Government agencies in Thailand are divided into ministries, departments and bureaux, each of which are separate juristic entities, having independent contracting powers. Thus, the MOI is a separate legal entity from the MNRE and the DPIM, but the DPIM answers to the MOI administratively. Even though the DPIM is only one among many departments within the MOI, it can enter into contracts with a private party, independent of the Ministry. The director-general, as the head of the department, is the signatory to contracts. The question of whether the department or the director-general has the power to conclude contracts and the parameters within which this power can be exercised is governed by the law on public administration.

Each government agency is only concerned with administering its own law, even though that law may contradict other laws or may be inconsistent with national policy. This fact poses a major problem for the mineral industry in that the DPIM is not the agency that has the final say on whether or not an exploration or mining venture can be conducted. The ultimate decision may rest with the ONEP or with the Forestry Department, depending on where the land is situated.

Foreign investors often believe that once they have signed a contract with the DPIM and have paid the bonus, they may then proceed with the exploration and development work. In reality, the contract is only a grant of mineral rights, subject to negotiation with the other agencies concerned, and there is no guarantee that investors will be given all necessary approvals in the end. The Forestry Act, the Minerals Act and the Environmental Act all have equal standing. Therefore, the DPIM, the Forestry Department and the ONEP are of equal legal status in the sense that none has authority to dictate terms to the other. There is no 'super agency' to reconcile differences among departments, or hand down binding judgments in case of conflict.

Policies issued by the heads of various ministries and departments are the real *modus operandi* for government officials, and the failure of the officials to comply with policies may result in disciplinary action. These policies are internal directives and are not known to the public. In Thai legislation there are many provisions giving wide discretionary powers to permanent officials responsible for administering the law.

The new Minerals Act includes much more comprehensive provisions regarding regulations by two ministries (the MOI and the MNRE), a new National Mineral Administrative Policy Board and the role of the DPIM. A Mineral Committee and Provincial Mineral Committees have been established.

## Surface rights

- 15 | What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Mining rights under the Minerals Act do not include any rights to the surface land. Surface rights over the mine vary depending on the type of land. Before applying for a mining lease, an applicant must acquire

the right to use the surface land from the public or private owner, as the case may be. Negotiation with a private landowner is concluded by purchase or lease. If the land is owned by the government, a permit issued by the concerned government agency is required to be submitted along with the application for an ML before an ML is granted.

Ownership of private land is governed by the Land Code, the Civil and Commercial Code and regulations as set forth by the Land Department of the Ministry of the Interior. Under Thai law, foreign nationals may own land only if a treaty has been entered into between Thailand and their country or if permission is granted by the Ministry of the Interior. Presently, there are no such treaties between Thailand and any other country. A majority foreign-owned company is prohibited from owning land under the Land Code unless it obtains a Board of Investment (BOI) promotion certificate and an exemption to own land is granted. If the operator cannot own the land, it may consider a lease as another option. A lease agreement can be valid for a maximum of 30 years and must be registered with the Land Department of the Ministry of the Interior.

Non-private land can be categorised as forest areas, which are supervised by the Forestry Department under the Forestry Act (1941) and National Reserved Forest Act (1964), or agricultural land reform areas under the Land Reform for Agriculture Act (1975), which is under the supervision of the Agricultural Land Reform Office. Licences from the concerned authority must be obtained. There are some categories of reserved areas that have been declared closed to exploration and mining activities. These include wildlife reserves, national parks, forests (conservation forests and economic forests) and areas reserved for security purposes. Development activities, including mining, are strictly prohibited in category 1A watershed areas, and restrictions apply to mining activities in economic forest areas. Other areas in the country are classified as urban areas, water bodies and areas for settlement programmes.

A government resolution for watershed classification in May 1985 prescribed that without exception, all development activities would be prohibited in forest areas classified as category 1A. Development in watershed category 1B is subject to government approval on a case-by-case basis and mining operations are permitted in watershed categories 2–5. It is more complicated to obtain permission to operate a mine in any category of reserved forest because of the revocation of forest concessions countrywide in January 1989. The revocation of forest concessions resulted in a reclassification of the country's forests, which are now classified as national parks, wildlife reserves, economic forests and land reform zones.

## Participation of government and state agencies

- 16 | Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Although there is no prohibition on the government participating in mining projects, there is no precedent for such engagement by the government.

The new Minerals Act provides that its requirements do not apply to the DPIM, DMR or DMF for the propose of survey, testing, study and research. Currently no state enterprise is involved in mining operations. There is no local listing requirement for a mining company.

## Government expropriation of licences

### 17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The MOI has the power to revoke a licence when the holder fails to comply with the regulations provided under the Minerals Act or the conditions and obligations attached to the licence.

The MOI is empowered to revoke an ML upon the occurrence of the following:

- it appears later that an ML was issued as a result of a prominent mistake or misunderstanding of material facts;
- the holder departs from the place of domicile or address and the LMIO is unable to communicate with him or her;
- the holder does not discharge all debts obligated under the Minerals Act within 90 days after receiving a written notice of payment from the LMIO; or
- the holder violates or commits an offence according to provisions under the Minerals Act, or fails to comply with the order of the LMIO or the conditions prescribed in the ML or related licence.

See Chapter 10 of the Minerals Act re dismissal, cancellation, amendment and revocation of mining leases.

There is no compensation for revocation. The Minerals Act itself has no provision regarding government expropriation of mining businesses or MLs.

There are guarantees against expropriation in the Investment Promotion Law (Board of Investment), ASEAN Comprehensive Investment Agreement and several bilateral investment treaties.

## Protected areas

### 18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

There are a number of types of land that are prohibited for mining, as outlined in question 15.

## DUTIES, ROYALTIES AND TAXES

### Duties, royalties and taxes payable by private parties

#### 19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

A company earning revenues from mining is liable to pay corporate income tax under the Revenue Code. The current rate is 20 per cent of the net profit. Dividend payments to overseas shareholders are generally subject to a withholding tax of 10 per cent.

### Mineral royalties

The Thai government collects mineral royalties from mining and mineral production. The Minerals Act provides that the persons under the Minerals Act, including the mining lease holder and metallurgical operator, must pay a mineral royalty, fees and a special contribution in Chapter 11. The mineral royalty rate for each type of mineral is determined by a ministerial regulation issued under the Mineral Act, and shall not exceed 30 per cent of market price. See the MOI's MR and two notifications issued on 1 October 2018 prescribing mineral royalty rates, guidelines regarding collection, market price determination, assessments, etc.

The MR BE 2561 (2018) prescribes mineral royalty rates, based on a market price announced by the Director General of DPIM, at the following rates:

- tin ore – 2.5 per cent to 20 per cent;
- mineral ore with tungsten oxide – 2.5 per cent to 20 per cent;
- lead ore – 2.0 per cent to 15 per cent;
- gold ore – 2.5 per cent to 20 per cent;
- zinc ore – 2.0 per cent to 15 per cent;
- gemstone – 10 per cent; and
- other mineral ores, as per the annex to the MR, at rates between 4 per cent and 10 per cent.

ML holders shall pay a special contribution of no more than 10 per cent of the mineral royalty of the minerals produced under that licence.

The Minister, on the recommendation of the Mineral Committee, may reduce fees and issue qualifications for eligibility for such reductions under defined circumstances, including 'reasonable grounds' (section 137).

Royalties will be paid based on the value of the particular mineral. Under the old Mineral Royalty Rates Act, some minerals were subject to the progressive rate with varying levels according to the price range and the maximum mineral royalty rate, while other types of minerals were subject to flat rates according to the kind, type and importance of the mineral.

### Value-added tax (VAT)

Mining companies are subject to VAT at a flat rate of 10 per cent (temporarily reduced to 7 per cent). However, a zero VAT rate applies to exports of minerals by mineral traders. VAT payable is calculated from the difference between input tax (VAT paid by the mining trader to suppliers of goods or services) and output tax (VAT collected by the mining trader from persons who purchase goods or services).

### Double tax treaties with other nations

At present, Thailand has double tax treaties with 61 countries, including China, Japan and the United States.

### Tax advantages and incentives

#### 20 What tax advantages and incentives are available to private parties carrying on mining activities?

### BOI promotional incentives

Currently (since 1 January 2015), under the Investment Promotion Act, only potash mining and dressing projects are eligible for promotion. As a precondition to applying for BOI incentives, a GPL, SPL or EPL must be obtained prior to submission of an investment promotion application for prospecting projects, and an ML must be obtained for potash mining and dressing projects prior to submission of an investment promotion application. Other types of mining activities are not eligible for promotion. The BOI's website at [www.boi.go.th](http://www.boi.go.th) includes a guide to the BOI and a summary of business law.

A mining project promoted by the BOI may be granted benefits including exemptions of customs duties for one year (which may be extended as deemed appropriate by the Board) on imported equipment and raw or essential materials used in manufacturing export products, and other non-tax incentives.

### Tax stabilisation

#### 21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There is currently no legislation in force that provides for either tax stabilisation or tax stabilisation agreements.

**Carried interest**

- 22 | Is the government entitled to a carried interest, or a free carried interest in mining projects?

Although there is no prohibition on the government holding an interest in mining projects, there is no precedent for such engagement by the government.

**Transfer taxes and capital gains**

- 23 | Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Consideration for transfer of licence is categorised as a taxable income that is subject to income tax at the rate prescribed by the Revenue Code. Capital gains are treated as normal income. VAT is applicable to transfers of rights.

**Distinction between domestic parties and foreign parties**

- 24 | Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

No.

**BUSINESS STRUCTURES****Principal business structures**

- 25 | What are the principal business structures used by private parties carrying on mining activities?

A Thai limited company is the usual choice of entity to hold MLs. In order to qualify for BOI promotion, the entity must be a limited company. Mining rights will not be granted to branches, non-registered partnerships, joint ventures or trusts.

**Local entity requirement**

- 26 | Is there a requirement that a local entity be a party to the transaction?

Under the current law, an entity doing business in mining (excluding exploration activity) must be Thai majority-owned; otherwise, a foreign business operation licence granted by the minister of commerce with the approval of cabinet must be obtained.

**Bilateral investment and tax treaties**

- 27 | Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Thailand has signed bilateral investment treaties (BITs) with 39 countries, of which 36 are in force, and has double tax treaties with 61 countries. Among these BITs, those with Australia (Thailand–Australia Free Trade Agreement (TAFTA)), Japan (Japan–Thailand Economic Partnership Agreement (JTEPA)) and the United States (Treaty of Amity) are considered more favourable. Under the TAFTA, a company with majority shareholders holding Australian nationality (up to 60 per cent) can engage in mining activities, but must be approved by the MOI and at least two-fifths of the directors must be of Thai nationality. This treaty does not exempt restrictions on foreign land ownership. The Treaty of Amity specifically includes the right to prohibit or limit US companies from engaging in activities that include the exploitation of land or resources. The JTEPA has no language specific to mining activities.

US and Japanese majority-owned companies must, therefore, adhere to restrictions and requirements for licensing found in the Foreign Business Operation Act (see question 13).

The ASEAN Comprehensive Investment Agreement includes provisions regarding mining and quarrying (article 3, paragraph 3(e)).

**FINANCING****Principal sources of financing**

- 28 | What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Domestic and foreign financial institutions are the principal source of financing for mining projects, by way of loans on standard commercial terms.

Public limited companies and private limited companies (with the consent of the Stock Exchange of Thailand (SET)) may issue debentures. Public limited companies may apply to be listed on the SET, in accordance with SET-prescribed rules.

**Direct financing from government or major pension funds**

- 29 | Does the government, its agencies or major pension funds provide direct financing to mining projects?

Generally, no. The government pension fund may invest in securities issued by the mining companies, having credit ratings that meet investment grades.

**Security regime**

- 30 | Please describe the regime for taking security over mining interests.

A licence for mining activities, granted by the governmental agency, cannot be mortgaged, pledged or assigned as security under Thai law. Rights under a mining lease are not subject to judgement execution.

**RESTRICTIONS****Importation restrictions**

- 31 | What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

The import of foreign machinery and equipment is subject to customs duty at rates prescribed in the customs tariff, and VAT (currently at the rate of 7 per cent). Exemptions may be granted by the BOI for promoted projects. In the case of a non-promoted company, the ratio of foreign staff to Thai staff shall not be greater than 1:4. The exemption to this limitation can be granted to the promoted company with the requirement that training and instruction must be expedited and support must be given to the Thai personnel in order that they can perform work in the promoted project in place of the foreign staff within the period of time prescribed by the BOI.

**Standard conditions and agreements**

- 32 | Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

Standard international forms are not commonly used in Thailand. It is the practice to split international EPC contracts into an offshore supply agreement ('sales of goods agreement' not subject to withholding tax

or stamp duty), and an onshore hire of work contract (subject to withholding tax and stamp duty).

### Mineral restrictions

- 33** What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

The person who can operate mineral processing must be the holder of a provisional mining lease or mining lease who undertakes mineral processing operations within its mining concession area, unless a mineral processing licence is obtained from the LMIO, which will issue and designate the mineral processing area. Mineral processing must be operated in accordance with the approved flow sheet and mineral processing procedure under supervision and responsibility of the licensed engineer.

See the two notifications of the MOI effective 31 January 2018 in relation to the type and condition of minerals subject to permission to import into Thailand or the continental shelf area, or export outside the country or its continental shelf area, and that are prohibited to export.

### Import of funds restrictions

- 34** What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are exchange control regulations administered by the Bank of Thailand on behalf of the Ministry of Finance, under the Exchange Control Act (1942).

In the past, Thailand had comprehensive exchange control regulations that were administered by the Bank of Thailand. Although approvals to repatriate capital and profits were discretionary, in practice, approvals were granted as a matter of routine provided one complied with applicable procedures. A number of relaxations of exchange controls have been announced by the Bank of Thailand since June 1990, and ceilings on outward remittances have been substantially increased. Presently, commercial banks are authorised to process most applications to purchase foreign currency. Foreign currency accounts may be established abroad and in Thailand.

There are no rules requiring proceeds from the sale of minerals to be used domestically.

## ENVIRONMENT

### Principal applicable environmental laws

- 35** What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

There are many laws relating to the management of environmental problems. Each of these laws contains certain environmental requirements that relate to principal activities of the competent authorities. For example, the Factories Law contains provisions designating the MOI as the body responsible for dealing with environmental problems arising from a factory's operation. The public health law designates the Ministry of Public Health and local authorities as the bodies responsible for certain environmental problems, such as public nuisance or wastewater management, among others. With respect to natural resources management and conservation, there are laws that apply to each type of natural resource, such as water, soil and minerals.

The Environmental Act (1992), as amended in 2018, is the principal law for managing environmental problems in all respects, including

water pollution, air pollution, noise pollution, other pollution, as well as hazardous waste and conservation of natural resources. In addition, the Environmental Act requires both private and public sectors to prepare an environmental impact assessment (EIA) report for the prescribed operations or activities, and provides for the establishment of an environmental fund to support activities related to environmental quality promotion and protection.

The Environmental Act established three principal agencies:

- the ONEP;
- the Department of Pollution Control; and
- the Department of Environmental Quality Promotion.

These three agencies are attached to the MNRE. Their main powers and duties are as follows.

### ONEP

The ONEP has the primary responsibility for the coordination and preparation of natural resources and environmental management plans to comply with the enhancement and conservation of national environmental quality law and other relevant laws, including proceedings relating to the assessment of environmental impacts that may arise from projects or activities of public and private sector companies.

### Department of Pollution Control

The Department of Pollution Control is primarily responsible for making recommendations regarding environmental quality standards and standards for controlling pollution from its source. Its duties include preparing measures for controlling, preventing and solving environmental problems arising from pollution, taking steps regarding pollution complaints and taking action under the national environmental quality promotion and protection law, the pollution law, as well as other relevant laws.

### Department of Environmental Quality Promotion

The Department of Environmental Quality Promotion is primarily responsible for the promotion and dissemination of information relating to the environment. In addition, it has a duty to compile, develop and provide services in relation to environmental data as the national environmental information and data centre, to promote public participation in environmental conservation, protection and utilisation of natural resources, to act as an environmental dispute prevention and mediation centre, to coordinate and propose plans and measures to promote and disseminate information relating to national resources and environmental protection, and to study, research, develop, support and transfer technology and environmental management.

The National Health Act provides a framework and guidelines for formulating national policies, strategies and activities in regard to national health, and provides mechanisms for securing continuous participation from all sectors in promoting health, and improving national health effectively and thoroughly. Health impact assessments (HIAs), as required under the Constitution, are formulated and supervised by this Act.

The new Minerals Act contains numerous provisions on environment and communities.

### Environmental review and permitting process

- 36** What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Important rules concerning environmental quality promotion and protection, which apply to exploration and mining under the Environmental Act are as follows.

Section 58 of the 2017 Thai Constitution provides that any project or activity that may cause severe impacts on the environment may not be done unless the impacts on environmental quality and health of people in the surrounding community has been studied and evaluated first. The rights of a community to have their input into any such evaluation, and take action against a government agency or organisation for not fulfilling these rights, are protected in the same provision. The environmental impact assessment report approval process is as provided in the Environmental Act (1992) as amended in 2018.

The new Minerals Act includes numerous provisions for environmental review, by both existing and new government agencies. See section 5 of the new Minerals Act for powers of MNRE and MOI.

### The National Environment Board

The National Environment Board has the power to prescribe the Environmental Act in the following areas:

- water quality in public water sources;
- underground water quality;
- air quality;
- noise level; and
- vibration etc.

In prescribing such standards, technical principles, scientific evidence, economic and social feasibility, as well as relevant technology, must be taken into consideration. If the National Environment Board deems it appropriate, it may prescribe higher environmental quality standards than the general standards in areas that have been declared conservation areas, environmental protection areas, areas that have been approved by the cabinet for the use of measures to solve environmental problems or a pollution control zone.

### General projects and activities

Under the Environmental Act, the Minister of Natural Resources and Environment, with the approval of the National Environment Board, has the power to require those undertaking certain projects or activities that may cause an impact to the environment to prepare and submit an EIA report. The projects or activities so required must be specified by notification in the Government Gazette.

Projects may be required to undertake either an EIA or an Environmental and Health Impact Assessment (EHIA). These two different levels of assessment depend on the type and size of the project. A project that is required to prepare an EHIA report as a project that may cause severe impact to the community in terms of environmental quality, natural resources and health of a community must do so in strict compliance with the notifications of the Ministry of Natural Resources and Environment regarding the criteria, procedure, regulations and guidelines for preparing such a report (found in a notification published on 29 December 2009).

### Mining assessments

All mining projects require an EIA report. EIA reports must be submitted in the application for the mining lease under the Ministry of Natural Resources and Environment Notification dated 24 April 2012, which came into effect on 21 June 2012.

The following mining activities require the preparation and submission of an EHIA (notification of 31 August 2010):

- underground mines whose structure is designed to collapse after mining without any support, and no substitute form of support is inserted to prevent the collapse (all sizes);
- mines for lead, zinc or other metallic mineral mines using cyanide or mercury or lead nitrate in the production process, or other metallic mineral mines with arsenopyrite as an associated mineral (all sizes);

- coal mines only in the case the coals are conveyed out of the project site by car (200,000 tonnes or more per month or 2.4 million tonnes or more per year); and
- seabed mines (all sizes).

The Minister of Natural Resources and Environment, with the recommendation of the Pollution Control Committee and the approval of the National Environment Board, has the power to prescribe standards for controlling pollution from its source, in order to control the release of waste water, emission of air pollution, dumping of waste or other pollution into the environment. However, other standards may be prescribed by other laws, such as the Factories Act. If the standards prescribed by other laws are not lower than those prescribed by the Environmental Act, such standards may be applied. In the event that standards prescribed by other laws are lower than those prescribed by the Environmental Act, the government agency in charge must amend those laws to make them consistent with the rules issued under the Environmental Act.

### Closure and remediation process

**37 | What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?**

The old Minerals Act required that land used for mining be restored to its original state when it is no longer used for mining. There were no provision of laws addressing the closure of mines under the old Minerals Act.

The new Minerals Act include comprehensive provisions including:

- section 19 – general criteria of deposit areas for mining, including possible mining buffer boundaries, etc;
- section 32 – power of Minister to issue notification re mining buffer boundaries, etc, applicable to all licences;
- section 56 – right of people in community to hold a referendum on issue of an ML;
- section 67 – power of Minister to issue notification regards establishment of a control and monitoring committee;
- section 68 – obligations of holder of MLs including restoration of mining areas according to plan of restoration, development, utilisation and monitoring on impact on environment and people's health during time of mining and after closure of the mine, as approved by the Mineral Committee, and placing of security for restoration and, in the case of category 2 and 3 mining, insurance;
- section 70 – revocation of MLs for failure to place security or take out insurance; and
- Chapter 6 (sections 76–93) – special provisions applicable to underground mining.

### Restrictions on building tailings or waste dams

**38 | What are the restrictions for building tailings or waste dams?**

The new Minerals Act includes numerous new provisions, which prescribe rights and powers of regulators to address the above subjects. See question 37.

The Engineer Act (1999) governs the licensing of persons in charge of the operation and management of projects.



## HEALTH AND SAFETY, AND LABOUR ISSUES

### Principal health and safety, and labour laws

- 39 | What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal health and safety law is the Environmental Act administered by the ONEP and National Health Act administered by the National Health Commission Office (NHCO). Labour laws applicable to the mining industry and administered by the Ministry of Labour include:

- the Labour Protection Act (1998);
- the Civil and Commercial Code on the hire of services;
- the Labour Relations Act (1975);
- the Act Establishing the Labour Courts and Procedure in the Labour Courts (1979);
- the Provident Fund Act (1987);
- the Social Security Act (1990); and
- the Compensation Fund Act (1994).

The new Minerals Act provides more comprehensive oversight of health and safety applicable to the mining industry. (New MRs and notifications will prescribe procedures for implementation).

### Management and recycling of mining waste

- 40 | What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Under the section 78 of the Environment Act, the municipality where a mine is located is given the responsibility of managing solid waste disposal generated by mining activities, or alternatively, contracting out such services to the private sector. The rights to explore and exploit other mining waste products in tailings and waste piles belong to the mining licensee, or a sub-lessor that has the requisite licence to perform such activities under the Mining Act, or supporting regulations.

### Use of domestic and foreign employees

- 41 | What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

All mining activities are subject to labour laws of general application (see question 39).

The employment of foreign employees is subject to laws and practices regarding visas and work permits.

The Emergency Decree on Administration of Alien Working, BE 2560 (2017), which superseded the Working of Aliens Act (1978), requires that every foreign national working in Thailand obtains a work permit with certain exceptions. Presently, 39 occupations are closed to foreign nationals, including architecture, civil engineering, accounting and law. Generally, foreign nationals may start working only after a work permit is issued. In practice, little difficulty is experienced in obtaining work permits for qualified foreign nationals in positions for which qualified Thai nationals are not available.

## SOCIAL AND COMMUNITY ISSUES

### Community engagement and CSR

- 42 | What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Thailand does not have corporate social responsibility (CSR) laws. However, section 58 of the 2017 Constitution provides that the operation of any activity that might affect the community cannot be engaged in unless a study and assessment of the effect on the environment (EIA) and health (HIA) of the affected community is completed and a hearing involving the public and interested persons is conducted and the opinions of environmental NGOs and higher education institutions providing studies in the field of the environment are obtained. Failure to comply with this law permits the affected party to bring a claim to the administrative court and the operation shall be suspended during the case procedure.

The NHCO conducts administration of HIAs under a notification of NHCO, which prescribed criteria and procedures to assess the health impact of public policy while the ONEP supervises administration of EIA reports and public hearings under the Environmental Act. (Additionally, there are community engagements or CSR requirements specified in the government gold policy, dated 6 May 2011.)

### Rights of aboriginal, indigenous or disadvantaged peoples

- 43 | How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

This is not applicable in this jurisdiction.

### International law

- 44 | What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The ASEAN Minerals Cooperation Action Plan 2016–2025 (AMC AP-111) promotes environmentally and socially sustainable mineral development. See AMC AP-111 in [www.asean.org/storage/2015/12/AMEM/AMCAP-III-\(2016-2025\)-Phase-1-\(Final\)2.pdf](http://www.asean.org/storage/2015/12/AMEM/AMCAP-III-(2016-2025)-Phase-1-(Final)2.pdf).

## ANTI-BRIBERY AND CORRUPT PRACTICES

### Local legislation

- 45 | Describe any local legislation governing anti-bribery and corrupt practices.

Thailand's primary legislation covering anti-bribery and corrupt practices is the Act Supplementing the Constitution Relating to the Prevention and Suppression of Corruption, BE 2561 (2018) (replacing the Act Supplementing the Constitution Relating to the Prevention and Suppression of Corruption, BE 2542 (1999)). Thailand has continued to amend other laws, such as the Anti-Money Laundering Act 1999, (last amended on 10 February and 8 August 2017), to encourage transparency and fulfil obligations under the United Nations Convention against Corruption, which Thailand ratified in 2011. The National Anti-Corruption Commission, the Public Sector on Anti-Corruption, and the attorney general's office are all empowered to investigate and prosecute possible corrupt practices.

## Foreign legislation

- 46 | Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Companies that fall under the jurisdiction of foreign anti-corruption legislation can be held liable for their activities in Thailand under those laws mentioned in question 45. Examples of legislation that could give rise to liability are the US Foreign Corruption Practices Act, the UK Bribery Act and the Organisation for Economic Co-operation and Development Convention against Bribery of Foreign Government Officials.

## Disclosure of payments by resource companies

- 47 | Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Thailand has initiated steps to become a candidate and become compliant with the EITI, but has not yet acceded to it.

## FOREIGN INVESTMENT

### Foreign ownership restrictions

- 48 | Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

See question 13.

## INTERNATIONAL TREATIES

### Applicable international treaties

- 49 | What international treaties apply to the mining industry or an investment in the mining industry?

Investment in a mining project may qualify for investment protection under a bilateral investment treaty. Thailand is currently a party to 36 bilateral investment treaties. Thailand is also party to the 2009 ASEAN Comprehensive Investment Agreement. Mining and quarrying, and services incidental to it are listed as one of the designated sectors to which the 2009 agreement applies.

## UPDATE AND TRENDS

### Recent developments

- 50 | What were the biggest mining news events over the past year in your jurisdiction and what were the implications? What are the current trends and developments in your jurisdiction's mining industry?

Prior to the new Minerals Act coming into force, the mineral processing licence of the Chatree gold mine was suspended, reportedly because of pollution incident claims. In December 2016, the Prime Minister issued an order under section 44 for Akara Resources to stop mining at that site, where mining ceased in January 2017. In May 2018, the company's Australian shareholders filed for international arbitration under TAFTA.

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